United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

12-10

74-2310

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

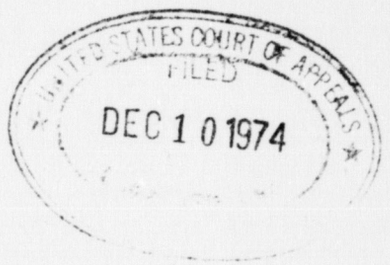
Appellee,

-against-

JOHN RUFUS ETHERIDGE,

Appellant.

Docket No. 74-2310



BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether appellant's impersonation of an Army sergeant in order to secure a personal loan is conduct violative of §912, which explicitly prohibits only impersonation of a United States officer or employee acting in his official capacity.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered on October 4, 1974, after a trial by the court without a jury, convicting appellant of false personation, in violation of 18 U.S.C. §912. Appellant was sentenced to a three-year probationary term.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statutory Provision Involved

Title 18, United States Code

Chapter 43 - False Personation

§912. Officer or employee of the United States

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Statement of Facts

Appellant was charged with pretending to be an employee of the United States, acting under the authority thereof, and in such pretended character demanding and obtaining approximately $200. Appellant waived his right to a jury trial (4*), and the case was presented to the court for determination. No witnesses testified for either the Government or appellant; instead, the case was submitted on the following stipulated facts:

> (1) On July 23, 1973, John R. Etheridge went to Headquarters Company of the United States Army Chaplain School, Fort Hamilton, Brooklyn, New York, and there obtained a request for leave form which he completed;
>
> (2) Etheridge then proceeded to the Identification Section, where he obtained a temporary ID card after explaining to the personnel that he was a current member of the Army on leave and had his wallet with all identification stolen;
>
> (3). Next, Etheridge went to Army Emergency Relief where he submitted an application for financial assistance, identifying himself as a current member of the United States Army, 553 Engineers, Fort Knox, Kentucky, with a home of record as 4165 Farlin Avenue, St. Louis, Missouri;
>
> (4) At the Army Emergency Relief, Etheridge informed employees that he required financial assistance because he was a member of the Army on a thirty-day leave (as indicated on the leave form he had previously

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*Numerals in parentheses refer to pages of the transcript of the trial dated May 10, 1974.

completed) and was robbed on July 21, 1973, of his wallet, which contained $175 in currency, a military identification card, and various credit cards. Etheridge stated he needed $200 to pay his hotel bills and return to Kentucky;

(5) At this time, Etheridge was in possession of papers from the New York City Police Department, 25th Precinct, indicating that he had lost his wallet on July 21, 1973;

(6) Etheridge also had in his possession the temporary identification card he had obtained at Fort Hamilton previously on July 23, 1973;

(7) Army Emergency Relief authorized a loan to Etheridge for $200, which was given him in the form of a check on July 24, 1973. Etheridge cashed this check at the Post Exchange at Fort Hamilton;

(8) On July 23, 1973, Etheridge again returned to the identification section at Brooklyn Army Terminal, where he obtained a permanent Army duty identification card;

(9) Etheridge then proceeded to the Base Finance Office and received $65 in partial pay;

(10) On July 26, 1973, Etheridge again went to the Base Finance Office, attempting to obtain another partial pay. At this time he was detained by the Criminal Investigation Division, who advised him to surrender to the FBI;

(11) On July 27, 1973, Etheridge surrendered himself to the FBI, at which time he gave a full statement of the foregoing facts;

(12) Throughout the time of these events, Etheridge was not a member of the United States Army;

(13) Monies of the Army Emergency Relief are not U.S. Government funds. Only active duty and retired military personnel and their dependents are entitled to Army Emergency

Relief monies;

(14) Etheridge completed and signed an allotment document agreeing that $200 be withdrawn from his August 1973 Army pay check, to be repaid to Army Emergency Relief.

Stipulation, part of the record on appeal.

Based on the foregoing facts, appellant argued for a judgment of acquittal on the ground that his conduct, while reprehensible, was not sanctioned by 18 U.S.C. §912. Specifically, he argued that the statute precluded only impersonation of a Federal officer or employee acting in an official capacity, and although appellant pretended to be an Army sergeant in order to obtain the $200 loan, he at all times clearly indicated he was acting in his own behalf and that the loan was for his own personal use.

In a memorandum decision* filed on June 7, 1974, the district court found appellant guilty as charged, holding, inter alia:

The gravamen of an offense under §912 is the use of a false and pretended relationship in order to obtain money or something of value. United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950, 70 S.Ct. 478. In the instant case, defendant received financial assistance because he represented himself to be a member of the United States Army....

Appendix C, at 6. Emphasis in the original.

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*The opinion of the District Court is annexed as "C" to appellant's separate appendix.

ARGUMENT

APPELLANT'S IMPERSONATION OF AN ARMY SERGEANT IN ORDER TO SECURE A PERSONAL LOAN IS NOT CONDUCT VIOLATIVE OF §912, WHICH EXPLICITLY PROHIBITS ONLY IMPERSONATION OF A UNITED STATES OFFICER OR EMPLOYEE ACTING IN HIS OFFICIAL CAPACITY.

On stipulated facts it was established that appellant obtained a $200 loan from Army Emergency Relief by pretending to be an Army sergeant who needed money because his wallet had been stolen while he was on leave. Appellant was indicted for violation of 18 U.S.C. §912, which provides:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.
>
> Emphasis added.

Section 912 has been interpreted to create two separate offenses: (1) falsely assuming to be an officer or employee acting under the authority of the United States and acting as such; and (2) in such pretended character demanding or obtaining money or thing of value. United States v. Barnow, 239 U.S. 74 (1915); Lamar v. United States, 241 U.S. 103 (1916); Pierce v. United States, 86 F.2d 949, 951 (6th Cir. 1936). Appellant was charged with the second offense, and this crime, like the first, requires the false personation of an officer or employee "acting under the authority of the United States...." Lamar

v. United States, supra, 241 U.S. at 115.

The only issue raised below and now on appeal is whether the statute requires that the impersonator pretend to be acting in his official capacity, or whether the statute extends the sanction also to those actions which, despite pretense of Federal employment, are not on behalf of the United States. Appellant maintains that the explicit language of the statute and its purpose render essential for conviction proof that the charade include assertion by the perpetrator that he is acting in his official capacity. In this context, the meaning of the §912 phrase "acting under the authority of the United States" is dispositive.

In United States v. Barnow, supra, 239 U.S. at 78, the Supreme Court held that interpretation of this statute* was to be in accord with the plain meaning of its language. See also Richards v. United States, 369 U.S. 1, 9 (1962). On its face the statute requires that the bogus officer or employee purport to act within his supposed authority. United States v. Grewe, 242 F.Supp. 826 (W.D.Mo. 1965); United States v. York, 202 F. Supp. 275 (E.D.Va. 1962).

In Grewe, the defendant pretended to be an employee of the United States Army in order to cash checks to pay her personal hotel bill. It was solely reliance on this misrepresentation which caused the hotel manager to cash the checks. United

*In Barnow, the Court was dealing with §32 of the Criminal Code, the predecessor of §912. Id., at 75.

States v. Grewe, supra, 242 F.Supp. at 828. In dismissing the indictment, the court held that the Government could not establish, as it was required under the statute to do, that the defendant, when cashing the checks, had pretended to be acting within her official capacity. Id., at 829.

Similarly, in United States v. York, supra, 202 F.Supp. 275, the court dismissed an indictment despite the fact that the defendant pretended to be an FBI employee in order to get credit approval for the purchase of a dress. In so holding, the court found dispositive the fact that the defendant

> ... was acting on her own because, like most women, she wanted another dress and she did not pretend to be buying the dress for the United States or in any way authorized by the United States to buy the dress.
>
> Id., at 277.

The court below tried to distinguish United States v. Grewe, supra, and United States v. York, supra, from this case on the grounds that appellant here received financial assistance because he represented himself as a member of the United States Army while, in the other cases, there were other factors as well which caused the money to be given.* This, however, distorts the gravamen of the crime. The thrust of the prohibited activity is that the representation be not only one of

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*This distinction is invalid on both the facts and the law. In Grewe, the Government conceded that the reliance on the false assertion of Federal employment was critical to the success of the hoax (id., at 828). In York, the court decision specifically eschewed reliance on the fact that York did not apply for credit because she was an FBI employee.

Federal employment,* but also one that includes an assertion of action on behalf of the Government. Thus, in York and Grewe, as long as the scheme was premised at least in part on a representation of Federal employment, the next issue which had to be decided was whether the assertion also included action on behalf of the Government. Indeed, the "but for the pretense of Federal employment" test (United States v. Lepowitch, 318 U.S. 702, 704 (1943)), establishes only the requisite element of intent to defraud and does not supplant the element of action on behalf of the Government. In fact, in Lepowitch, the essense of the defendant's scheme was his pretense that he was acting on behalf of the Government.

Moreover, to interpret the phrase "acting under the authority of the United States" as requiring only an assertion of Federal employment is to violate one of the basic tenets of statutory construction, in that it would render the statutory words meaningless and mere surplusage. United States v. Wong Kim Bo, 427 F.2d 720, 722 (5th Cir. 1972); United States v. Johnson, 462 F.2d 423, 428 (3d Cir. 1972). If Congress had intended to require merely a false pretense of employment, the words "acting under the authority" are unnecessary, and would have been omitted and the statute would have read, in pertinent part:

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*In this context it is interesting to note that the assertion of Federal employment was not the only way to secure a loan from Army Emergency Relief; funds were also available to retired Army personnel.

> Whoever falsely assumes or pretends to be an officer or employee of the United States....

That the statute requires the pretense of Federal authority is further indicated by judicial articulation of the purpose of the statute. In United States v. Barnow, supra, 239 U.S. at 77-78, the Court explained that the intent of the statute was to preserve respect for the Government and respect for the authority of government officers and employees. It is clear that a fraud perpetrated by someone pretrending Federal employment but nonetheless acting on his own behalf and not for the Government does not infringe upon the general respect for the operations of the Government:

> ... It is the false pretense of Federal authority that is the mischief to be cured.
>
> United States v. Barnow, supra, 239 U.S. at 78.

See also United States v. Wight, 176 F.2d 276, 378-379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

In the instant case, because appellant made no pretense of Federal authority, his conduct is not punishable under 18 U.S.C. §912.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the indictment ordered dismissed.

Respectfully submitted,

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Certificate of Service

December 10, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Grossberg